

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EARL DEAN CHRISTIAN, JR.,

Plaintiff,

V.

H. MACIAS, et al.,

Defendants.

Case No. 2:21-cv-0305 KJN P

**[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION FOR LEAVE
TO FILE A PRE-ANSWER MOTION
FOR SUMMARY JUDGMENT FOR
PLAINTIFF'S FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES AND
FOR AN EXTENSION OF TIME TO
FILE A RESPONSIVE PLEADING
AFTER RULING ON MOTION FOR
SUMMARY JUDGMENT**

Plaintiff is a state prisoner, proceeding through counsel. On October 12, 2022, defendants filed a motion for leave to file a pre-answer motion for summary judgment regarding exhaustion of administrative remedies. Defendants' counsel contacted plaintiff's counsel concerning this motion; plaintiff's counsel advised that plaintiff will not oppose the motion or the relief sought, and met and conferred with plaintiff's counsel as to the briefing schedule included in the motion.

As discussed below, the motion is granted.

Defendants' Motion

Defendants contend plaintiff did not fully and properly exhaust his administrative remedies as to all defendants and all allegations made against such defendants before initiating the instant

1 action and therefore seek leave to file a pre-answer motion for summary judgment regarding
2 same. (ECF No. 47.) Defendants also request that their pre-answer motion for summary
3 judgment be without prejudice to filing a later motion for summary judgment regarding
4 substantive defenses and grounds for dismissal. (ECF No. 47 at 4-5.) Alternatively, if the Court
5 is not inclined to grant the request, then defendants seek a thirty-day extension of time to file a
6 responsive pleading.

7 Discussion

8 The Prison Litigation Reform Act exhaustion requirement expressly states that “[n]o action
9 shall be brought . . . until administrative remedies are exhausted.” 42 U.S.C. § 1997e(a). The
10 exhaustion requirement is both mandatory and a condition precedent to the filing of a case in
11 federal court. Booth v. Churner, 532 U.S. 731 (2001). In the Ninth Circuit, exhaustion of
12 administrative remedies must be filed by a motion for summary judgment, not a motion to
13 dismiss under Rule 12(b). See Albino v. Baca, 747 F.3d 1162, 1170 (9th Cir. 2014) (en banc),
14 overruling Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003) (permitting exhaustion to be raised in
15 a motion to dismiss and treating it as a matter of abatement). If defendants could raise exhaustion
16 by a Rule 12(b) motion, the instant motion would not be necessary because defendants could first
17 move to dismiss based on exhaustion and if denied, thereafter answer. See e.g. Bryant v. Rich,
18 530 F.3d 1368 (11th Cir. 2008). But such is not the case in the Ninth Circuit.

19 The Federal Rules of Civil Procedure provide that a party must serve an answer within 21
20 days after being served with a summons and complaint or if service has been waived under rule
21 4(d) within 60 days after the request for waiver was sent. Fed. R. Civ. P. 4(a)(1)(A). Under Rule
22 56, a party may move with or without supporting affidavits for summary judgment on part or all
23 of the claims at any time until 30 days after the close of discovery. Fed. R. Civ. P. 56(b). This
24 means that party may file a summary judgment motion at any time, even before filing an answer.

25 In contrast to Rule 12(a)(4), which extends the time to answer when a Rule 12 motion is
26 brought, Rule 56 is silent as to whether filing a motion for summary judgment tolls the time to
27 file an answer. Courts in the Ninth Circuit have concluded that by analogy to Rule 12(a)(4), it is
28 appropriate to extend the time to file the answer until the court decides the motion for summary

1 judgment "where such motion adequately contests the action." See Mann v. Lee, 2009 WL
2 5178095 (N.D. Cal. Dec. 22, 2009); Klebanow v. New York Produce Exchange, 344 F.2d 294,
3 296 n.1 (2d Cir. 1965) (court has discretion to entertain pre-answer motion for summary
4 judgment).

5 Here, a motion for summary judgment based on exhaustion contests the adequacy of the
6 action. If plaintiff did not fully and properly exhaust his available remedies, dismissal is proper.
7 As argued by defendants, courts are directed to decide exhaustion, if feasible, before reaching the
8 merits. Albino, 747 F.2d 1170. Therefore, in the interests of efficiency and judicial economy, the
9 undersigned grants defendants' motion to file a pre-answer motion for summary judgment on
10 exhaustion grounds, tolls the time to file a responsive pleading until thirty days after the final
11 decision on exhaustion issues, if appropriate, and grants defendants permission to file a second
12 motion for summary judgment on the merits if the exhaustion motion is denied.

13 Accordingly, IT IS HEREBY ORDERED that:

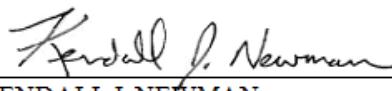
14 1. Defendants' motion to file a pre-answer motion for summary judgment on exhaustion
15 grounds (ECF No. 47) is granted;

16 2. Defendants shall file and serve their motion for summary judgment on exhaustion
17 grounds within forty-five days from the date of this order; plaintiff shall file and serve his
18 opposition thirty days from the date the motion is filed; and defendants' reply, if any, shall be
19 filed and served fifteen days after the opposition is filed;

20 3. Defendants' request for an extension of time to file a responsive pleading (ECF No. 47)
21 is granted; defendants' responsive pleading shall be filed, if appropriate, thirty days after the court
22 issues its ruling on defendants' motion for summary judgment on exhaustion grounds; and

23 4. Defendants are granted leave to file a second motion for summary judgment on the
24 merits if the exhaustion motion is denied.

25 Dated: October 14, 2022

26 
27 KENDALL J. NEWMAN
28 UNITED STATES MAGISTRATE JUDGE